

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/10/2003

CORAM

THE HONOURABLE MR. JUSTICE E. PADMANABHAN

W.P.No. 961 of 1998 and W.P.No.962 of 1998

and

3943, 20457, 20458, 20872, 20873, 21155 to 21158, 31261 to 31264,
21 356 to 21360, 23168 to 23173, 23417, 23909 to 23915, 15803,
25440, 25 441, and 25342 to 25349, 26368, 26369, 13872, 25081 to
25086, 23047, 23083 of 2001

and

60,61, 353 to 360, 583, 637, 904, 909, 938, 1262, 1335,
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and

WPMP Nos: 30173, 30174, 30803, 3084, 31261 to 31264, 31543 to 31547 34136 to 34141, 34551, 35341 to 35347, 23415, 37719 to 37721/2001

and

30173, 30174, 30803, 30804, 31261 to 31264, 31543 to 31547, 34136 to 34141, , 34551 35341 to 35347, 23415, of 2001 93,84, 516, 523, 894, 957, 1023, 1295, 1300, 1325, 1766, 1861, 1862, 2400 to 2403, 2413, 24 39 to 2444, 2446, 3117, 3132 to 3135, 3149, 3150, 5156 to 3159, 3175 , 3483, 3605, 3697, 3733, 3767, 3768, 4064 to 4067, 4154 to 4156, 417 5 to 4176, 4322 to 4324, 4426, 4533, 4542, 4543. 4532, 4548, 4558, 45 59, 4900 to 4902, 5208 to 5210, 5245 to 5248, 5373, 5438, 5518, 5727 to 531, 5434, 5939 to 5942,6076 to 6079, 6117, 6128, 6147, 6148, 6382 to 6385, 6893, 6894, 6519, 6522, 6923 to 6926, 6957, 7152, 7232, 735 8 to 7360, 7367, 7368, 7396 to 7408, 7413 to 7415, 7416, 7417, 7418 to 7421, 7517, 7587, 7614, 4615, 7650, 7657, 8115 to 8118, 8115, 8116, 8143, 8233 to 8236, 8491, 8529, 8542, 8543, 8579, 8808, 8813, 8994, 8995, 8808, 9253, 9286, 948, 9506, 9649, 9655, 9917, 9918, 10231, 103 03, 10381 to 10384, 10385, 10386 to 10388, 10535, 10560, 10571, 10578 , 10608, 10611, 10612, 10613, 10614, 10686, 10975, 10976, 11089, 111 27 to 11129, 11277, 11357, 11461, 11569, 11570, 11573, 11574, 11802 to 11805, 11817, 11889, 12090, 12106, 12135, 12156 to 12162, 12178, 12 254, 12255, 12378, 12379, 12438, 12752, 12914, 13540, 13757, 15056, 14057, 14154, 14339, 15011, 15049, 15253, 15254, 15255, 15639, 15937 , 15938, 15944 to 15949, 16413, 16757 to 16759, 18453, 18530 to 1853 3, 19528, 19529, 19942 to 19946, 20914 to 20920, 21199 to 21201, 212 93, 21324, 21397 to 21401, 21472 to 21475, 21508, 21517, 21518, 21542 , 21564, 21641, 22054, 22055, 22123, 22129, 22964 to 22967, 23264, 23 431 to 22434, 23571, 24478, 24839 to 24841, 25069, 26124, 26176, 2687 3, 26874, 26961, 26962, 27049, 27050, 27281, 26647, 26658, 27559, 276 56, 27667 to 27669, 28194 to 28197, 28244, 28748, 28841, 29049, 2906 9, 29279, 29420, 29538, 29929 to 29934, 30086, 30449, 30991 to 30994, 31003 to 31006, 31024, 31161, 31162, 31278, 31306, 31508, 31516, 31 522, 31701, 31802, 32403, 32758, 32811, 32812, 33312 to 33314, 33822, 33899 to 33901, 33933, 47755, 47774, 48291, 45885, 45962, 46637, 469 48, 47054 to 47056, 48451 to 48457, 52768, 15518, 16536, 16585, 24448 to 24451, 33503, 29375, 48221, 48553, 48665 to 48672, 49559, 49560, 49680, 49706, 51062, 51063, 51484,

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and

1477 to 1480, 2088, 2186, 2221, 2235, 2250, 2251, 2628, 3294, 3934, 5077 to 5079, 6578, 7990, 8169, 8170, 8474, 8558, 8866, 10049, 10050, 13841, 13842, 16384, 16390, 23114, 4154, 11360, 17223, 21762, 231 68 and 28433 of 2003

and

WVMP. Nos; 1266, 1237, 1338, 1248, 1249, 1239 to 1241, 1258 to 1262, 1251 to 1256, 1243 to 1246, 1230 to 1235, 1263, 1210 to 1215, 1227 to 1229, 1216to 1219, 1220 to1224, 1250, 1207 to 1209, 1225 and 1226 of 2002.

W.P.No:3943 of 2002

M/s.South India Small

Spinnrs Association rep. By its

President Mr.U.G.Kanakarajan

Avinashi Road, Coimbatore ..Petitioner

-Vs-

1. The Secretary to Govt.,

Govt., of Tamil Nadu

Energy Department

Fort St. George

Chennai-9

2. The Tamil Nadu Electricity Board

rep. By its Chairman,

800, Anna Salai, Chennai-2

3. Tamil Nadu Electricity Regulatory Commission

rep. By its Chairperson,

Seethammal Colony, Alwarpet

Chennai-18. ..Respondents

Writ Petitions preferred under Art.226 of The Constitution of India, seeking for the relief of writ of Declaration, declaring the Tamil Nadu Electricity (Taxation on Consumption) Act, viz., Act, 32 of 1991 as ultra vires, as stated therein.

For petitioners: Mrs.Nalini Chidambaram, S.C.,

Mr.R. Thiagarajan,S.C.,

Mr.R.S.Pandiaraj,

Mr.Palani Selvaraj,

Mr.Kamalanathan,

Mr.Sivanandham,

Mr.C.S.Krishnamurthy

Mr.Rahul balaji

Mr.T.S.Sivagnanam

Mr.V.Ramajegadeesan

Mr.S.K.Nachimuthu

Mr.S.Kadarkarai

Mr.Md.Ibrahim Ali

Mr.S.Rakkappan

Mr.K.Kalyanasundaram

Mr.P.Radhakrishnan

Mr.R.kannan

Mr.N.Manoharan

Mr.K.Rajasekar

Mr.M.Ajmalkhan

Mr.G.Veerapathiran

Mr.C.Premamo Louis

Mr.S.Jaswanth

Mr.K.R.A.Muthukrishnan

Mr.M.Jayaraman

Mr.Vijay Narayan

Mr.R.Vijayaraghavan

Mr.S.N.Kribanandam

Mr.V.P.Sengottuvel

Mr.M.Kannadasan

Mr.A.R.Jeyasankar

MR.V.Sanjeevi

Mr.V.Bharathidasan

Mr.S.Mohan

Mr.S.Navaneethakrihsnan

Mr.C.M.Krisnakumar

Mr.K.Selvaraj

Mr.N.L.Rajah

Mr.S.Natarajan

M/s.Aiyar & Dolia

M/s.Muthuani Doraisamy

Mr.S.Subbiah

M/s.Silambannan

For Respondents: Mr.N.R.Chandran,

Advocate General,

Mr.R.Raghupathy,

Additional Government Pleader

Mr.N.Srinivasan, for

Tamil Nadu Electricity

Regulatory Commission.

:COMMON ORDER

In this batch of writ petitions the petitioners either Company or individual or Association of members, as a consumer of electricity have prayed for the issue of a writ of Declaration declaring the Tamil Nadu Electricity (Taxation on consumption) Act, viz., Act 32 of 1991 as ultra vires the Constitution of India, illegal, invalid and unenforceable and consequently direct the respondents to refund the entire amount collected from the consumers under the head of Electricity Tax.

2. Heard Mrs.Nalini Chidambaram, learned Senior Counsel, Mr.R. Thiagarajan, learned Senior Counsel, Mr.Kamalanathan, Mr.Palani Selvaraj, Mr.Sivanandam, Mr.R.S.Pandiaraj, and other learned counsels appearing for the petitioners, Mr.N.R.Chandran, learned Advocate General for the State of Tamil Nadu, and Mr.N.Srinivasan, learned standing counsel appearing for the respondents 2 and 3.

3. The petitioners seek to invalidate Section 3.A of the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962. The petitioners challenge the levy of additional tax on the consumption of energy in terms of Section 3.A in these batch of writ petitions. The petitioners seek to invalidate Section 3.A as introduced by Tamil Nadu Act 32 of 1991 and consequently seek for refund of the tax collected respectively from each one of them. Section 3A which is impugned reads thus:-

"3.A Levy of Additional Tax on consumption of energy:--(1)Save as otherwise provided in Sub Section (1) of Section 3, there shall be levied and paid to the Government every month, an additional tax on the consumption of energy calculated at the rate of four per centum of the price of energy consumed by the consumer:

provided that no additional tax shall be levied under this sub section--

(a) On the energy consumed by any person for domestic connections including hut connections or for agricultural purposes; or

(b) on the energy consumed by any person (other than a licensee) who consumes energy generated by himself.

(2) The additional tax under sub section (1) shall be levied in addition to any tax payable on the consumption of energy levied and collected under sub section (1) of section 3.

(3) The provisions of this Act shall apply in relation to the addition to the additional tax payable under sub section (1) as they apply in relation to the tax payable under sub section (1) of Section 3."

4. Section 3.A was inserted by the Tamil Nadu Electricity (Taxation on Consumption) Act 1991 (Act 32 of 1991). The Act 32 of 1991 received the assent of the Governor on 11th October 1991 and it came into force with retrospective effect from 1st October, 1991 as provided by Section 1(2) of the Amending Act.

5. The learned counsel appearing for the petitioners fairly stated that the impugned provision namely Section 3.A of the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 falls well within the competency of the State Legislature. There is no dispute that Section 3 .A falls within Entry 53, List II of Schedule VII to the Constitution. Therefore it cannot be contended that it is not being contended that the provision is ultra vires.

6. Proviso to Section 3.A also provides that no additional tax has been levied under section 3.A on the energy consumed by any person for domestic connections including sale to hut connections or for agricultural purposes. So also the energy generated and consumed by the consumers is not subjected to additional tax. Sub section (3) makes it clear that Section 3.A shall apply in relation to the addition to the additional tax payable under sub section (1) as they apply in relation to the tax payable under sub section (1) of Section 3.

7. The learned counsel appearing for the petitioners mainly contended that by G.O.Ms.NO.787, PWD, dated 30th April 1979, the State Government by way of simplification and rationalisation of tariff structure merged all duties or taxes, being additional levies, such as surcharge, metropolitan levy and electricity tax, wherever applicable depending upon the class of consumers and also the Central Excise surcharge. The said G.O. Ms No. 787, PWD, dated 30th April 1979 has merged the tariff rate which includes the levy of tax excepting metropolitan levy and Central Excise Surcharge.

8. The State Government issued a Notification under section 4 of the Tamil Nadu Revision of Tariff Rates and Supply of Electrical Energy Act, 1979 and existing schedule was substituted by a new schedule of tariff rates. New tariff rates consist of basic rate, besides central excise surcharge, metropolitan levy. The basic rate varied from High Tension to Low Tension. Low Tension and Tariff 1,2, and 4 etc., Basic Rate differed and apart from basic rate for KVA of maximum demand per month has also been included in the tariff rate. The said tariff rate is nothing but general conditions of supply prescribed by the Tamil Nadu Electricity Board from time to time. After G.O.Ms.No.78 7, dated 30th April 1979, which came into force on 1.5.1979, there has been further revision of tariff rates by the following Government Notifications:-

G.O.Ms.Nos

Date

Date of effect

1.G.O.Ms.NO.787, PWD, (Electricity)

30.4.1979

1/5/1979

2.G.O.Ms.NO.1518, PWD,(Electricity)

11/9/1981

15.9.1981

3.G.O.Ms.NO.861, PWD, (Electricity)

30.4.1982

1/5/1982

4.G.O.Ms.NO.1033, PWD, (Electricity)
16.5.1983
16.5.1983
5.G.O.Ms.NO.793, PWD, (Electricity)
25.5.1985
1/6/1985
6.G.O.Ms.NO.3042, PWD, (Electricity)
23.12.1986
1/7/1987
7.G.O.Ms.NO.482, PWD, (Electricity)
22.3.1989
1/4/1989
8.G.O.Ms.NO.553, PWD, (Electricity)
12/3/1990
1/4/1990
9.G.O.Ms.NO.1434, PWD, (Electricity)
27.8.1991
1/9/1991
10.G.O.Ms.NO.402, PWD, (Electricity)
24.1.1992
1/2/1991
11.G.O.Ms.NO.313, PWD, (Electricity)
26.2.1993
1/3/1993
12.G.O.Ms.NO.35,Energy Dept.,(A.2)
1/3/1994
1/3/1994
13.G.O.Ms.NO.29,Energy Dept.,(A.2)
31.1.1995
1/2/1995
14.G.O.Ms.NO.17,Energy Dept.,(A.2)
14.2.1997
15.2.1997
15.G.O.Ms.NO.115,Energy Dept.,(A.2)
19.7.1998
20.7.1998
16.G.O.Ms.NO.3,Energy Dept.,(A.2)
7/1/2000
7/1/2000
17.G.O.Ms.NO.95,Energy Dept.,(A.2)
28.11.2001
1/12/2001

9. While referring to G.O.Ms.No:787 PWD, Dt.30.4.1979, it is contended that tax has already been merged with tariff rate under the policy of rationalisation and simplification and having rationalised and merged the tax with tariff rate, it is not open to the respondents to levy additional tax. It is also contended that the respondents have no authority to levy additional tax under Section 3.A as it is without authority. When no tax has been levied under Section 3, the levy of additional tax under Section 3.A is without authority and unenforceable. In other words, it is contended that

when there is no levy of tax under section 3 of the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962, no question of levy of additional tax arises under Section 3.A and such a demand is without authority.

10. It is contended by Mr.Palani Selvaraj as well as by Mr. Pandiaraj that levy of tax under the Electricity Act either under Section 3 or under Section 3.A as inserted by the Amending Act unconstitutional or is illegal and not authorised by law in that the levy infringes Art.288 of The Constitution in so far as the Act has not been reserved for the assent of President before levy of tax on Electrical or energy and therefore the provision is unenforceable. Hence a direction may be issued to refund the tax so far collected under the Act.

11. It is further contended by the counsel for the petitioners that after merger, there being no identity of tax levied under section 3 , Section 3.A is unenforceable and there could be no levy of additional tax. It is also contended that it amounts to double taxation. It is contended that Section 3.A offends Art.14,19 and 21 of The Constitution, besides the State has no legislative competency to enact the Amending Act, 32 of 1991. It is also further contended that it is an arbitrary exercise of power conferred on the State. According to one of the counsel, there could be no levy of additional tax on the consumption of energy and it is beyond the legislative competency.

12. Mr.Rahul Balaji, appearing for one of the petitioners namely M/s.Madras Cements Company, referred to the exemption granted in favour of the said petitioner and contended that there cannot be levy under section 3.A. Mr.Rahul Balaji, contended that having granted exemption in favour of the petitioner, it cannot be taken away indirectly under section 3.A by imposing additional tax in respect of consumption of energy which is generated by the said petitioner.

13. Per contra, the learned Advocate General leading the arguments on behalf of the respondents contended that Section 3.A of the Act is an independent provision which operates on its own strength and it is well within the legislative competency of the State Legislature. It is contended that the rate of levy has been increased and earlier merger of tax which was leviable under section 3 has no consequence and even after merger also Section 3.A will operate independently and there could be a levy of additional tax under Section 3.A. It is contended on behalf of the respondents that levy under Section 3.A will not amount to double taxation. Even assuming so, double taxation is permissible and valid in law, unless and until it is established that such levy is confiscatory in nature.

14. The learned Advocate General relied upon the pronouncement of the Supreme Court in State of U.P., Vs. Renusagar Power Company, reported in AIR 1988 SC 1737 in this respect.

15. In these batch of Writ Petitions, the following points arise for consideration:-

(1) Whether Section 3.A as introduced by Tamil Nadu Electricity (Taxation on Consumption) Act, 1991 is beyond the legislative competency of the State Legislature?

(2) Whether the provision of Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 as well as the Amendment Act are invalid, inoperative and unenforceable as the same has not been reserved for the President for consideration in terms of Art.288 of The Constitution?

(3) Whether there could be a levy of additional tax under section 3.A when the levy under section 3 ceased to exist on and after 1st May 1979?

(4) Whether the levy of additional tax is expropriatory and violate Art.14 of The Constitution?

(5) To what relief, if any?

16. Taking up the first and second points together for consideration at the first instance, identical points were considered by this court in a batch of writ petitions challenging the validity of levy of tax on consumption under the Tamil Nadu Tax on consumption or sale of Electricity Act, 2003 and rejected after detailed consideration. However, it is sufficient to refer to the provisions of The Constitution, while considering the contentions. It is to be pointed out that the word "Consumption" is found under List II, Entry 53 of Schedule VII which reads thus:-

53. TAXES ON THE CONSUMPTION OR SALE OF ELECTRICITY

"`Consumption'. The word, not being limited in any way, authorises the imposition of a duty on the consumption of Electricity by the producer himself. Such a duty cannot be regarded as a duty of excise within the meaning of Entry 84 of List I".

This is the settled legal position as has been held by the Supreme Court.

17. The levy of additional tax in the present case by the impugned provision is on the consumption of electrical energy which falls within Entry 53. This additional levy under section 3.A falls well within the Legislative competency and there cannot be any doubt. The Supreme Court in J.C.Mills Vs. State of Madhya Pradesh, reported in AIR 19 63, SC 414 upheld the validity of identical levy. The Supreme Court held thus:-

"(6) It is difficult to see how the levy of duty upon consumption of electrical energy can be regarded as duty of excise falling within Entry 84 of List I. Under that Entry what is permitted to Parliament is levy of duty of excise on manufacture or production of goods (other than those excepted expressly by that entry). The taxable event with respect to a duty of excise is Manufacture or production. Here the taxable event is not production or generation of electrical energy but its consumption. If a producer generates electrical energy and stores it up, he would not be required to pay any duty under the Act. It is only when he sells it or consumes it that he would be rendered liable to pay the duty prescribed by the Act. The Central Provinces and Berar Electricity Act was enacted under Entry 48-B of List II of the

Government of India Act, 1935. The relevant portion of that entry read thus:-

"Taxes on the consumption or sale of electricity"

Entry 53 of List II of the Constitution is to the same effect. The argument of Mr. Sastri is that the word "consumption" should be accorded the meaning which it had under the various Electricity Acts, including Indian Electricity Act, 1910. Under that Act and under the various Provincial and other Acts, consumption of Electricity means according to him, consumption by person other than producers and that both in the Government of India Act and under the Constitution the word Consumption must be deemed to have been used in the same manner. The Acts in question deal only with a certain aspect of the topic electricity, and not with all of them. Therefore, in those Acts the word consumption may have a limited meaning, as pointed out by learned counsel. But the word consumption has a wider meaning. It means also use up, spend etc., the mere fact that a series of laws were concerned only with a certain kind of use of Electricity, that is consumption of electricity by persons other than the producer cannot justify the conclusion that the British Parliament in using the word consumption in Entry 48-B and the Constitution Assembly in Entry 53 of List II wanted to limit the meaning of Consumption in the same way. The language used in the legislative entries in the Constitution must be interpreted in a broad way so as to give widest amplitude of power to the Legislature to legislate and not in a narrow and pedantic sense. We cannot, therefore, accept either of the two grounds urged by Mr. Viswanath Sastri challenging the vires of the Act."

18. In a recent pronouncement in *State of Andhra Pradesh, Vs. National Thermal Power Corporation Ltd.*, reported in 2002 (5) SCC 203 the Supreme Court held that a levy on the sale or consumption of electricity is well within the legislative competence and valid. In that case tax on the interstate sale of electricity was sought to be levied by the State of Andhra Pradesh and while invalidating such a levy on the interstate sale the Supreme Court held thus:-

"33. On behalf of the States of A.P. And M.P., it was submitted that the subject of electricity has been specifically dealt with by Articles 287 and 288 of the Constitution and by implication the Articles, other than Articles 287 and 288, should be read as not dealing with electricity. This submission is stated only to be rejected. These articles make some provisions for electricity and water or electricity in the special context dealt with by those articles and do not exclude applicability of other articles where electricity has been dealt with as goods."

19. In *State of U.P., Vs. Renu Sagar Power Company*, reported in AIR 1988 SC 1737, at page 1761, the Supreme Court held thus:-

"75.....Price fixation, in our opinion, which is ultimately the basis of rise in cost because of the rise of the electricity duty is not a matter for investigation of court. This question was examined by this Court in *Union of India v. Cynamide India Ltd* where one of our learned brothers who delivered the judgment of the High Court of Allahabad was a party. There in exercise of the powers under Section 3(2)(c) of the Essential Commodities Act, the Drugs (Prices Control) Order, 1979 was made. The Central Government thereafter issued notification thereunder. At page 741 of the report, C

Chinnappa Reddy, J. speaking for the court referring to a passage of Administrative Law by Schwartz with approval expressed the view that those powers were more or less legislative in character. Fixation of electricity tariff can also to a certain extent be regarded of this category. Chinnappa Reddy, J. observed at page 735 of the report that price fixation is more in the nature of a legislative activity than any other. He referred to the fact that due to the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is 'difficult in theory and impossible in practice'. Reddy J. insisted that it is necessary that the line must sometimes be drawn as different legal right and consequences may ensue. It appears to us that subsection (4) of Section 3 of the Act in the set up is quasi-legislative and (quasi-administrative insofar as it has power to fix different rates having regard to certain factors and insofar as it has power to grant exemption in some cases, in our opinion, is quasi-legislative in character. Such a decision must be arrived at objectively and in consonance with the Principles of natural justice. It is correct that with regard to the nature of the power under Section 3(4) of the Act when the power is exercised with reference to any class it would be in the nature of subordinate legislation but when the power is exercised with reference to individual it would be administrative. Reference was made in this connection to the cases of Union of India v. Cynamide India Ltd. and P. J. Irani v. State of Madras."

20. In the circumstances, the first point has to be answered in favour of the respondents and against the writ petitioners holding that Section 3.A as introduced by the Tamil Nadu Act, 1991 is well within the legislative competency of the State Legislature and it is intra vires of the Constitution.

21. As regards Art. 288 also, this court has considered the very same contention elaborately while examining the validity of Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 and held that Art.288 of The Constitution has no application at all. If electrical energy by any Authority established by an existing law for developing any interstate river or river valley, unless the enactment has been reserved for the consideration of the President and received the assent, there cannot be a levy on such generation, sale or distribution by that authority. Here, none of the petitioner falls under the category of interstate river or river valley authority constituted by an Act of Parliament, nor the petitioners consumed power sold by such river valley authority or constituted by interstate river or river valley authority so that they could claim that levy without consent of the President is prohibited by Art.228 and therefore, it is invalid. This is not the case here.

22. It is not open to the petitioners to invoke Art.288. The generation or sale or distribution of electrical energy in the present case is

not by any interstate river or river valley authority constituted by an enactment of Parliament and therefore no reliance could be placed upon Art.288. In the present case, the generation and sale of electrical energy is by the Tamil Nadu Electricity Board or it is a generation and consumption by the consumers themselves in their own generating plants or captive generators and therefore invocation of Art.288 is a misconception and it cannot be relied upon. In the circumstances the point has to be answered in favour of the respondents and against the writ petitioners.

23. Taking up the next point for consideration it has to be pointed out that Section 3.A as introduced by the Amending Act operates as an independent charging section. Section 3 provides that additional tax is levied and shall be paid to the Government on the consumption of energy calculated at the rate of 4 per centum of the price of energy consumed by the consumer. Therefore in respect of consumption of electrical energy by a consumer, an additional quantum of tax is levied at the rate of 4 per centum of the price of energy consumed by the consumer. Section 3.A which is the charging section operates independent of Section 3. It is like surcharge or enhancing the rate of duty or tax payable under the Act with respect to consumption of electrical energy by a consumer. As already pointed out it falls under the legislative competency of the State. It is for the State to fix rate of taxes either calling it as basic rate or surcharge or additional tax any other terms so long as it is not expropriatory in nature. The rate of 4 per centum as was introduced by the Tamil Nadu Act, 32 of 1991 has subsequently been revised and enhanced to 5 per centum by Tamil Nadu Act 43 of 1994. This again is an additional levy which is additional to the tax levied and payable under section 3 on the consumption of electrical energy by a consumer. If a consumer consumes electrical energy the consumer has to pay an additional amount of tax at 4 per centum of the price of energy consumed by the consumer in addition to the tax if any payable under Section 3.

24. Even though there has been a merger of levy under Section 3 with schedule of tariff notified under section 4 of the Tamil Nadu Revision of Tariff Rate of Supply of Electrical Energy Act, 1978, it cannot be held that there has been no levy, nor it could be held that there has been a total exemption from levy, nor it could even be suggested that levy of tax under Section 3 has been suspended. Admittedly there is no notification under the Tamil Nadu Electricity Act, (Taxation on Consumption) Act, 1962. But, 1991 Act confers power of exemption in terms of Section 12 or 13. Admittedly no notification has been issued under the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962. IN fact the electricity tax has been levied under Section 3 . Therefore the contention that there has been merger is of no consequence and at any rate the same will not render Section 3.A as nugatory or unenforceable. As already pointed out Section 3.A operates independently as a charging section and it is an additional levy of tax.

25. While considering the effect of G.O.Ms.No:787, Public Works Department, dated 30.4.1979, a Division Bench of this Court in M/s. Navbharath Ferro Alloys Ltd., Ms.6 & others Vs. The State of T.N. rep. by the Secretary to Govt., PWD (Electricity), reported in 1997 Writ L.R.201, and

examining the levy in particular the basis for calculation of energy tax, held thus:-

"5. The contention is that in the event the revised tariff is also applied as clarified by the Chief Engineer, in his memo No.450/J2/70-2 dated 10.5.1979, the revised tariff effected under G.O.ms.No.787 P. W.D (Electricity) dated 30.4.1979 would include the tax whatever leviable, therefore the amount of tax payable on the tariff that prevailed prior to G.O.Ms.No.787 dated 30.4.1979 shall have to be excluded from the price of energy for the purpose of levying the energy tax. We are of the view that the energy tax payable by the captive energy consumers has to be determined not on the basis of the explanatory memo issued by the Chief Engineer. It is not explained as to under what authority he had issued such memo. Even without going into that question, we are of the view that what is relevant for the purpose of deciding the energy tax liability of the petitioners, who are using the captive energy produced by them, is the definition of the price of energy as per Sec.2(9), Sub sec. (2) of Sec.5 and Sec.3(1)(a) and (b) of the Tamil Nadu Act 4 of 1962. All these provisions, which have been referred to above, read together would make it clear that the tariff for the time being prevailing in force would be the price or the money consideration payable by the energy consumers. Whatever may be the contents of the tariff, as long as it answers the requirement of the definition of price of energy as meaning the money consideration paid by a consumer to a licensee, excluding items (i) to (iv) of Cl.(9) of Section 2 of the Tamil Nadu Act 4 of 1962 would be the price of energy therefore, we are of the view that it is not possible to accede to the contention of the petitioner that in the tariff revised by G.O.M.s.NO.787 dated 30.4.1979 the tax payable on the tariff as it stood prior to 1.5.1979 should be excluded for the purpose of determining the energy tax, because the said tax payable on the tariff has been made as part and parcel of the price or the money consideration payable by the energy consumer to the licensee.

6. The Tamil Nadu Act 1 of 1979 has been considered by a Division Bench of this Court (to which one of us the Hon'ble The Chief Justice, was a party) M/s.Snam Abrasives Ltd., rep, by its director T.V. Sivaraman, V. The Commissioner and Secretary to the Government Public Works & Electricity Department and Others (ILR 1996) 2 Madras 501). In para 11 of the said decision, it has been held that Section 4 of the Act No.1 of 1979 gives power to the State Government to change the tariff schedule. The relevant portion of the judgment is as follows:-

"...When section 4 gives the power to change the Schedule, it goes without saying that the Government has the power to prescribe the rates different from what was prescribed under Act 1 of 1979 and in so doing they can equally prescribe a different rate for the industries which had been grouped, under Heading V. Special Tariff. Therefore, when the Tariff Schedule Act was first amended by G.O.Ms.NO.787 dated 30.4.1979 the fact that the Synthetic Gem Industry was levied at the rate of 20 Paise per KWH where as Caustic Soda, Calcium Carbide, Aluminum Fertiliser etc., were charged at the rate of 17 paise, 10 paise, 19 paise respectively per KWH cannot be faulted on the ground that a different classification had been adopted. We are clearly of opinion that only tariff rates as applicable to certain industries have been

prescribed and this is perfectly legitimate and within the power of the Government under section 4 of the Act. In other words, Section 4 does give the power to the Government industries by amending the schedule and this is precisely what has been done in the various Government orders. The first contention of the appellants, therefore, fails....."

The explanatory note issued by the Chief Engineer, whose authority has not been explained to us, is not in conformity with the reasons for issuing G.O.Ms.No.787 dated 30th April, 1979. In addition to that, as already pointed out the said explanatory note apart from being contrary to Section 4 of Act 1 of 1979 the scope of which is explained in the aforesaid decision is not relevant for purpose of deciding the price of energy in relation to the captive energy produced by the consumers."

This answers the material contention advanced by the learned counsel for the petitioners. This court is bound by the Division Bench pronouncement of this Court.

26. Sub section (2) of Section 3.A makes it clear that the imposition under section 3.A(1) shall be in addition to any tax payable on the consumption of energy levied and collected under sub section (1) of Section 3. The Legislature has made it clear that the levy under section 3.A(1) shall be in addition to the levy payable under sub section (1) of Section 3. Even assuming for the purpose of argument that there has been no levy under sub section (1) of Section 3 there could be a levy under section 3.A(1) in respect of consumption of energy by the consumer calculated at the rate of 4 per centum of the price of energy consumed by the consumer.

27. As rightly pointed out by the learned Advocate General Section 3.A operates independent of Section 3 and the State Legislature has imposed an additional amount of tax under sub section (1) of Section 3.A which is in addition to all the tax payable under section (1) of Section 3. Assuming for purpose of argument that there has been no levy under sub section (1) of section 3, it cannot be contended that there could be no levy at all under section 3.A(1). Such a contention is a misconception and has no legs to stand. As already pointed out it is a further levy under sub section (1) of Section 3.A and section 3.A(1) being the charging section itself, operates independently and the consumption of energy tax has been levied at the rate of 4 per centum on the price of energy consumed by the consumer. Therefore it makes no difference whether there is separate levy of tax under section 3(1) or not. As already indicated there has been a levy under sub Section (1) of Section 3 and it is not as if there has been no notification withdrawing or suspending the enforcement of the provisions of the Act.

28. There may be individual exemption under sections 12 or 13 of the 1962 Act. But the same will not in any manner impinge upon Section 3.A or the operation of levy under section 3.A(1). The learned counsel for the petitioners advanced such a contention while placing reliance on a publication by the Electricity Board which indicates salient features of the revised tariff stating that there shall not be any levy of tax. But a perusal of the tariff notification is otherwise. Even assuming so, the same will not affect

the levy under section 3.A which also falls within the legislative competency of the State.

29. Mr.Ragul Balaji, learned counsel appearing for M/s.Madras Cements contended that there is an exemption in favour of the petitioner and therefore there cannot be a levy. The said contention overlooks the sub section in Sec.3.A. It is an exemption in respect of levy under section 3(1). However, proviso to Section 3.A(1) makes it clear that no additional tax has been levied under sub section (1) of Section 3.A on the energy consumed by any person who consumes energy generated by itself. This proviso has been lost sight of by Mr.Rahul Balaji, counsel for the petitioner. Hence this contention cannot be countenanced.

30. Taking up the next point for consideration, namely levy of additional tax of 4 per centum on the tax cannot be held to be expropriatory in nature, nor it offends Art.14. It is a levy of tax which falls within the legislative competency of the State. As rightly pointed out by the learned Advocate General there could be a double taxation also so long as such taxation is not expropriatory.

31. In *Empire Industries Ltd., V. Union of India*, reported in 1986 SC 663, the imposition of tax by Legislature was challenged as violative of Art.14. In that context, the Supreme Court held thus:-

"49. Imposition of tax by legislation makes the subjects pay taxes. It is well-recognised that tax may be imposed retrospectively. It is also well-settled that that by itself would not be an unreasonable restriction on the right to carry on business. It was urged, however, that unreasonable restrictions would be there because of the retrospectivity. The power of the Parliament to make retrospective legislation including fiscal legislation are well-settled. (See *M/s Krishnamurthi & Co. v. State of Madras*.) Such legislation per se is not unreasonable. There is no particular feature of this legislation which can be said to create any unreasonable restriction upon the petitioners."

32. In *Venkateshwara Theater Vs. State of Andhra Pradesh*, reported in AIR 1993 SC 1947, the Apex Court while analysing the case law and taxation provision with reference to Art.14 the Supreme Court held thus:-

"20. Since in the present case we are dealing with a taxation measure it is necessary to point out that in the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. (See: *East India Tobacco Co. v. State of A.P.*(AIR 1962 SC 1733), *P.M. Ashwathanarayana Shetty v. State of Karnataka* (AIR 1989 SC 100), *Federation of Hotel & Restaurant Association of India v. Union of India* (1989) 2 SCR 918, *Kerala Hotel & Restaurant Association v. State of Kerala* (AIR 1990 SC 913) and *Gannon Dunkerley and Co. v. State of Rajasthan* (1993) 1 SCC 364.)"

33. In *Kodar Vs. State of Kerala*, reported in Vol.34 (1974) SC 73 at

page 76, the Supreme Court while testing the validity of additional tax as infringing Art.19(1)(g) and 19(1)(f), held thus:-

"9. As regards the contention that the State Legislature has no power to pass the measure, we are of the view that additional tax is really a tax on the sale of goods. The object of the Act, as is clear from its provisions, is to increase the tax on the sale or purchase of goods imposed by Tamil Nadu General Sales Tax Act, 1959 and the fact that quantum of the additional tax is determined with reference to the sales tax imposed would not alter its character. It may be noted that additional tax is to be imposed only if the turnover of a dealer exceeds Rs 10 lakhs. It is in reality a tax on the aggregate of sales affected by a dealer during a year. The additional tax, e, is an enhancement in the rate of the sales tax when the turnover of a dealer exceeds Rs 10 lakhs a year and it is a tax on the aggregate of -the sales affected by the dealer during the year. The decisions in *Ernakulam Radio Company v. State of Kerala* which was affirmed by a Division Bench of the Kerala High Court in *Kuikar v. Sales Tax Officer* took that view. The same view was taken by the Andhra Pradesh High Court in *A.S. Ranachandra Ran v. State of Andhra Pradesh* This is the correct view. Entry 54 in List II authorises the state legislature to impose a tax on the sale or purchase of goods. So, the contention of the appellants that the additional sales tax is not a tax on sales but on the income of the dealer is without any basis.

10. As regards the second contention that the provisions of the Act are violative of the fundamental rights of the appellants under Article 19(1)(f) and 19(1)(g), as the tax is upon the sale of goods and is not shown to be confiscatory, it cannot be said that the provisions of the Act impose any unreasonable restrictions upon the appellants' right to carry on trade. It is, no doubt, true that every tax imposed some restriction upon the right to carry on a business; but it would not follow that the imposition of the tax in question is an unreasonable restriction upon the appellants fundamental right to carry on trade. Generally speaking, the amount or rate of a tax is a matter exclusively within the legislative judgment and as long as a tax retains its avowed character and does not confiscate property to the State under the guise of a tax, its reasonableness is outside the judicial ken."

34. In fact except making bald averments that the levy is expropriatory, no basis has been made as to how it is expropriatory. Levy of 4 per centum as additional tax on the fact is not expropriatory, nor it violates Art.14. There is nothing to show that the levy of 4 per centum is arbitrary. Hence, this point is also answered in favour of the respondents and against the petitioners.

35. In the result, all the writ petitions and WPMPs are dismissed holding that introduction of Section 3.A by Tamil Nadu Act, 32 of 1991 is not liable to be declared as invalid or unenforceable or inoperative. No case has been made out for issue of a writ of Declaration invalidating Section 3.A as introduced by Tamil Nadu Act, 2 of 1991, nor the petitioners are entitled to the consequential relief prayed for by them. The parties shall bear their respective costs in these Writ Petitions and consequently all WPMPs are also dismissed.

Indedx: Yes
Internet: Yes

gkv

To

1. The Secretary to Govt.,
Govt., of Tamil Nadu
Energy Department
Fort St. George
Chennai-9

2. The Tamil Nadu Electricity Board
rep. By its Chairman,
800, Anna Salai, Chennai-2

3. Tamil Nadu Electricity Regulatory Commission
rep. By its Chairperson,
Seethammal Colony, Alwarpet
Chennai-18.

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